Two Wheel Corp., d/b/a Honda of Mineola *and* Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO. Cases 29–CA–12216–1 and 29–CA–12269

July 9, 1991

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On January 16, 1990, Administrative Law Judge D. Barry Morris issued the attached supplemental decision. Thereafter, the Respondent filed exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[2] and conclusions.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, subject to a confirmation of the figures set forth in the backpay specification by the compliance officer, and orders that the Respondent, Two Wheel Corp., d/b/a Honda of Mineola, Mineola, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied, as the parties had adequate opportunity to present the issues and their positions at the hearing and in the exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Although we find no merit in the Respondent's exceptions to the formula used by the General Counsel in calculating the amended backpay specification and although there are no exceptions to the General Counsel's arithmetic calculations, we have been unable to reconcile fully figures shown in the amended backpay specification regarding the gross backpay and interim earnings of discriminatee Twitchell. There appear to be some minor discrepancies between the figures set forth in the exhibits and those set forth in the backpay specification. Accordingly, to ensure that there have been no arithmetic and/or typographical errors in the calculations, our adoption of the judge's recommended Order is subject to a confirmation by the compliance officer of the figures set forth in the amended backpay specification.

Craig Cohen, Esq., for the General Counsel.
Mr. Morris Zegarek, of Mineola, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. On October 7, 1987, the National Labor Relations Board issued an Order directing Two Wheel Corp., d/b/a Honda of Mineola (Respondent) to make whole certain employees, including Milfred Twitchell, for any loss of earnings they may have suffered as a result of Respondent's unfair labor practices and to make whole Twitchell and Harlan Piper for any loss of earnings due to Respondent's refusal to pay them holiday pay for Christmas Day 1985 and New Year's Day 1986. A controversy having arisen over the amount of backpay due each discriminatee, on March 31, 1989, the Regional Director for Region 29 issued a backpay specification and notice of hearing. An amended backpay specification and notice of hearing was issued on June 28, 1989. Respondent filed timely answers to the specification and its amendment.

A hearing was held before me on September 25, 26, 27, and 28, and November 27, 1989. All parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Neither party filed a brief.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE DISCRIMINATEES

The Board ordered Respondent to make whole its service mechanic employees for losses of earnings from the date the unilateral changes were instituted in January 1986 until the date of the collective-bargaining agreement between the parties. The amended backpay specification alleged that four service employees were hired after January 1986 and before February 26, 1987, the effective date of the contract. The four discriminatees alleged in the amended backpay specification are Cesear Gonzalez, David Esteves, James Mamato, and Patrick White. Susan Panepento, the Board's compliance officer, credibly testified that Philip Zegarek, an officer of Respondent, told her that these four individuals were service employees. Philip Zegarek was not called as a witness to controvert the testimony. I credit Panepento's testimony and find that the above-named four individuals are service employees and are included under the terms of the Board's Order.

II. COMPUTATION OF BACKPAY

The amended backpay specification utilized as the appropriate measure of gross backpay due to Twitchell his earnings during 1985. Respondent contends that sales in 1986 declined by 10.4 percent from sales in 1985 and therefore in all likelihood Twitchell's earnings in 1986 would have been approximately 10 percent less than his earnings in 1985. The General Counsel argues that inasmuch as Twitchell was the best and most experienced of Respondent's service mechanics, it is entirely possible that there would have been no decline in Twitchell's earnings. Indeed, the evidence in the record shows that the salaries of service employees increased in 1986 by approximately $20,000 over the salaries of such employees in 1985. Respondent's contention that Twitchell's earnings may have been less in 1986 is mere speculation. As was stated in *Atlantic Marine*, 211 NLRB 230, 233 (1974):

> [W]hat would have happened had the Company not discharged the man is now pure speculation. All we know with certainty is that [the discriminatee] stopped work here because the Company forced him to [do] it. If the

> Respondent wished to take advantage of what it now assumes as predictable probability, all it had to do was simply let nature take its course, and not commit unfair labor practices.

See also *F & W Oldsmobile*, 272 NLRB 1150, 1151 (1984). Accordingly, I find that the appropriate measure of gross backpay due to Twitchell is his earnings during 1985 as alleged in the amended backpay specification. In addition, I find that an appropriate measure of the gross backpay due Gonzalez, Esteves, Mamato, and White is their gross earnings during their respective backpay periods multiplied by five percent.

III. ATTEMPTS TO OBTAIN EMPLOYMENT

Respondent contends that Twitchell did not make adequate efforts to obtain employment and that his position with the Festo Corporation was not substantially equivalent to his previous position with Respondent. The record contains testimony of Twitchell as to the efforts he made to seek employment. Respondent has not shown that Twitchell did not ''make reasonable efforts to find interim work.'' *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 575–576 (5th Cir. 1966). An employer may mitigate his backpay liability by showing that a discriminatee ''wilfully incurred'' loss by a ''clearly unjustifiable refusal to take desirable new employment.'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941). This, however, is an affirmative defense and the burden rests upon the employer to prove the necessary facts. *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813 (5th Cir. 1966). See generally *Sioux Falls Stock Yards Co*., 236 NLRB 543, 551 (1978); *F & W Oldsmobile*, supra at 1152.

With respect to Respondent's contention that Twitchell's employment with Festo was not substantially equivalent to his former employment with Respondent, as the late Judge Harold B. Lawrence aptly stated in *Continental Insurance Co*., 289 NLRB 579 at 596 (1988):

> A backpay claimant will not be held to have failed to make diligent effort to find interim employment merely because he sought a different type of position than that in which he had been employed when he was wrongfully terminated. He must seek employment, but not necessarily employment in an identical job. Seeking a somewhat different job does not disqualify a backpay claimant so long as he does not reject or fail to seek, in addition, employment substantially similar to his former employment. *Avon Convalescent Center*, 219 NLRB 1210 (1975), modified 549 F.2d 1080 (6th Cir. 1977).

Accordingly, in line with well-established precedent, I find that Respondent has not sustained its burden of showing that Twitchell did not make reasonable efforts to find interim employment.

Conclusion

At the hearing the backpay specification was amended to reduce Twitchell's net backpay by $40 so that the total net backpay due Twitchell would be $13,431.83. As amended, I find that the backpay computations set forth in the specification are appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Two Wheel Corp., d/b/a Honda of Mineola, Mineola, New York, its officers, agents, successors, and assigns, shall pay to each of the following employees as net backpay the amount set forth opposite each name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[2] less tax withholdings required by Federal and state laws:

Milfred Twitchell	$ 13,431.83
Harlan Piper	158.72
Cesear Gonzalez	336.70
David Esteves	81.27
James Mamato	332.45
Patrick White	200.62

[1] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977).